No. 06-1005

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EFRAIN SANTOS AND BENEDICTO DIAZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In this case, the Seventh Circuit reaffirmed its holding in *United States* v. *Scialabba*, 282 F.3d 475, cert. denied, 537 U.S. 1071 (2002), that the word "proceeds" in the principal federal money laundering statute means "profits" rather than "gross receipts." As the government has explained in its petition for a writ of certiorari, the court's decision squarely conflicts with subsequent decisions of two other courts of appeals and cannot be reconciled with the results and reasoning in numerous other money laundering cases. The decision also poses serious obstacles to effective enforcement of the money laundering statute. It removes a large class of routinely-prosecuted cases from the statute's reach. It subjects the government to an unreasonable burden of proof in all other money laundering cases, and it enmeshes the courts in intractable disputes over the accounting principles that should govern illegal enterprises. Furthermore, the court of appeals' construction of the term "proceeds" is contrary to its most common

meaning, as well as the meaning that Congress gave the same term in related statutes, including one enacted just two years before the money laundering statute. Respondents have not refuted any of those fundamental submissions. Accordingly, this Court's review is warranted.

A. The Court Of Appeals' Decision Conflicts With Decisions Of Other Courts Of Appeals

Respondents do not dispute that the Seventh Circuit's decision squarely conflicts with the First Circuit's decision in *United States* v. *Iacaboni*, 363 F.3d 1, cert. denied, 543 U.S. 978 (2004), and the Third Circuit's decision in *United States* v. *Grasso*, 381 F.3d 160 (2004), vacated and remanded on other grounds, 544 U.S. 945 (2005), reinstated in relevant part, Nos. 03-1441 & 03-1442 (3d Cir. May 20, 2005). Nor do they deny that the Seventh Circuit's reasoning and result is at odds with the Eighth Circuit's decision in *United States* v. *Huber*, 404 F.3d 1047, 1058 (2005), and the Sixth Circuit's adoption of a "total revenue" definition of "proceeds" in *United States* v. *Haun*, 90 F.3d 1096, 1101 (1996), cert. denied, 519 U.S. 1059 (1997).

Diaz nonetheless argues (Br. in Opp. 12-13) that the Court should deny review because it denied review in *Iacaboni* and *Grasso*. But that argument overlooks that the government opposed review in those cases because they presented unsuitable vehicles for deciding the "proceeds" issue, not because the conflict did not warrant this Court's resolution. In particular, the government argued that *Iacaboni* was an unsuitable vehicle because the defendant had challenged only a forfeiture order, not his underlying money laundering conviction, and he may have waived his claim by pleading guilty to the laundering charge. U.S. Br. in

Opp. at 11-13, *Iacaboni* v. *United States*, 543 U.S. 978 (2004) (No. 04-183). In *Grasso*, the government argued that the defendant could not prevail even if "proceeds" meant "profits" because his claim was subject to plain error review. The government also noted that review would be premature because the government was seeking initial en banc review in this case. U.S. Br. at 10-14, *Grasso* v. *United States*, 544 U.S. 945 (2005) (No. 04-858). This case presents none of the vehicle problems that justified denying review in *Iacaboni* and *Grasso*.

Both respondents argue (Santos Br. in Opp. 6, 12; Diaz Br. in Opp. 13) that this case has a vehicle problem of its own: They contend that the "proceeds" issue is not determinative of the outcome because their conduct did not amount to money laundering under any definition of "proceeds." They base that contention on the further claim that the alleged laundering transactions were constituent parts of the underlying gambling offense. Respondents' argument is incorrect, for two reasons.

First, respondents' contention that their money laundering transactions were components of the underlying offense was not a basis on which relief was granted by either court below, and that contention could not provide an alternative ground to support the court of appeals' judgment. Respondents did not raise the claim in their Section 2255 motions, and they would be barred from raising that claim in a second or successive motion. See 28 U.S.C. 2255 para. 8. Diaz did raise the related claim that his receipt of compensation "did *not* promote" the underlying gambling activity, Diaz Mem. of Law in Supp. of 28 U.S.C. 2255 Mot. 12, but he did not raise the claim he now makes that the money laundering transactions were "integral parts" of the underlying offense. Br. in Opp. 13. Even if one read his promotion

claim to encompass that issue, he still could not obtain relief from the Seventh Circuit on that basis, because that court previously rejected a virtually identical claim by Santos. See *United States* v. *Febus*, 218 F.3d 784, 789-790 (rejecting argument that the payments to the collectors did not constitute money laundering because they were "essential transactions of the illegal gambling business"), cert. denied, 531 U.S. 1021 (2000).

Second, respondents' contention that the charged money laundering transactions were not distinct from the underlying gambling offense is incorrect. Courts have held that the distinction between a money laundering transaction and the underlying crime is generally maintained by requiring that the laundering transaction "follow and * * * be separate from any transaction necessary for the predicate offense to generate proceeds." *United States* v. *Mankarious*, 151 F.3d 694, 706 (7th Cir.), cert. denied, 525 U.S. 1056 (1998). In this case, the illegal gambling operation generated proceeds when the bettors placed the wagers with the runners. Santos's payments to the runners, collectors, and winners were separate transactions that followed the transactions that generated those proceeds.

Respondents mistakenly assert (Santos Br. in Opp. 6; Diaz Br. in Opp. 13) that the payments to the runners, collectors, and winners were integral or constituent elements of the underlying gambling offense. The underlying offense charged in the indictment was the conduct of a gambling business in violation of 18 U.S.C. 1955. Indictment counts 3-4. Nothing in Section 1955 makes the payment of employees or winners an element of the offense. The Section 1955 offense was, in turn, predicated on violations of various Indiana gambling statutes, including Ind. Code Ann. § 35-45-5-3(a)(6)

(LexisNexis 2004), which makes it a crime to "accept * * * for profit, money * * * risked in gambling," and Ind. Code Ann. § 35-45-5-3(a)(4) (LexisNexis 2004), which makes it a crime to "sell chances" in lotteries. Indictment count 2. Under the plain language of those provisions, a gambling offense is complete once the wager is placed. Subsequent payments to employees and winners are not elements of the offense. Otherwise, defrauding employees or successful bettors would provide a defense—and that cannot be the case.

Respondents also incorrectly suggest (Santos Br. in Opp. 10; Diaz Br. in Opp. 13) that the salary payments were not transactions distinct from the underlying gambling offense because the employees took their salaries from the money they collected before turning it over to Santos, instead of being paid by Santos after giving him the money. It makes no difference for purposes of the money laundering statute which method of payment Santos employed. Each employee's removal of his salary from the gross amount he collected (as previously arranged with Santos) was a financial transaction that followed and was separate from the underlying gambling offense. Respondents have thus failed to demonstrate that this case is not a suitable vehicle for resolving the conflict among the courts of appeals on the meaning of "proceeds."

B. The Question Presented Is Of Recurring Importance

Respondents have also failed to rebut the government's showing that the question presented is of recurring importance. They do not dispute that the Seventh Circuit's rule precludes money laundering prosecutions based on financial transactions by criminals to pay the expenses of their illegal enterprises. Santos also does

not dispute that the rule presents serious practical problems for other money laundering prosecutions. And Diaz concedes the rule may present "difficulties in proof * * * in individual cases." Br. in Opp. 10. Diaz nonetheless argues (*id.* at 5, 7-10) that the government has not demonstrated that the rule actually impairs money laundering enforcement efforts. That is incorrect.

Prosecutions based on the payment of the expenses of criminal enterprises have historically constituted a large percentage of all money laundering cases. Pet. 17-19 & n.3. Diaz concedes that prosecutions on that basis "would be excluded under *Scialabba*." Br. in Opp. 9. Although he speculates that the government might still be able to prosecute expense cases by relying on other, non-expense transactions, he does not provide any support for that speculation. *Ibid.* In fact, non-expense transactions are likely to be more difficult to identify and to prove, particularly under *Scialabba*, which requires proof that they involved "profits," and not just gross receipts, of the criminal enterprise. In any event, the fact remains that *Scialabba*'s preclusion of prosecutions based on expense payments dramatically curtails the scope of the money laundering statute as it has been traditionally understood.

Diaz contends (Br. in Opp. 5, 7) that the government has not identified any case in which the *Scialabba* rule has actually interfered with a money laundering prosecution. On the contrary, the rule resulted in the reversal of money laundering convictions in both *Scialabba* and this case. It is not surprising that there have been no other reversals of convictions in the Seventh Circuit since *Scialabba*, because the government generally adheres to circuit law in deciding whether to prosecute. As for cases in other circuits, the rule would have prevented

the prosecutions in *Iacaboni*, *Grasso*, and *Huber* if it had been adopted by the courts that decided those cases.

The *Scialabba* rule also impedes effective prosecution of those money laundering cases that it does not categorically preclude. *Scialabba* requires the government to prove the existence of "profits," but criminals rarely keep accurate accounting records, and it is not clear what accounting principles courts should apply to determine whether an illegal enterprise has made "profits" for money laundering purposes. Pet. 11-12, 15-17. Although Diaz notes (Br. in Opp. 6, 8) that the government recovered some financial records in this case, nothing suggests that those records were sufficiently comprehensive or accurate to prove that respondents' gambling business made a profit. Moreover, the fact that respondents kept some records does not establish that criminal enterprises in general keep the kinds of records necessary for the government to meet its burden under *Scialabba*. On the contrary, both Congress and the courts, including the Seventh Circuit, have noted the "extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits." S. Rep. No. 225, 98th Cong., 1st Sess. 199 n. 24 (1983) (quoting *United States* v. *Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), aff'd in part and vacated in part, 432 U.S. 137 (1977)); see *Grasso*, 381 F.3d at 169 n. 13; Pet. App. 13a.

Diaz asserts that the lack of accounting principles for illegal businesses is not a problem because courts can apply "the same basic 'accounting principles' whether a business is lawful or unlawful." Br. in Opp. 8. But even where criminals keep financial records, their format is unlikely to conform to generally accepted accounting principles (GAAP). Legal businesses are required by various statutes and regulations to follow particular ac-

counting methods for tax and financial reporting purposes, *e.g.*, 26 U.S.C. 441-448 (2000 & Supp. IV 2004); 15 U.S.C. 77s(b), 7218 (Supp. IV 2004); 17 C.F.R. 210.4-01(a)(1), but there is no reason to believe that illegal businesses will follow those methods. Furthermore, Diaz's assertion rests on the mistaken premise that one, uniform set of accounting rules applies in all contexts. On the contrary, not all businesses are legally required to keep their books according to GAAP, see Robert N. Anthony et al., *Accounting: Text and Cases* 11 (12th ed. 2007), and GAAP does not always require identical accounting treatment of identical transactions, see *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 544 (1979). Moreover, the rules governing financial accounting frequently differ from those governing tax accounting. See Stephen F. Gertzman, *Federal Tax Accounting* ¶ 1.01[4], at 1-5 (2d ed. 1993); *id.* ¶ 2.02[2][c], at 2-28 to 2-29. Thus, under the Seventh Circuit's decision, courts will have to choose among sometimes conflicting accounting rules, without any guidance on which rule to apply for measuring illicit profit. It is unlikely that Congress would have made criminal liability turn on such difficult and uncertain determinations.

C. The Decision Of The Court Of Appeals Is Incorrect

Respondents have also failed to refute the government's showing that the decision of the court of appeals is incorrect. Diaz notes (Br. in Opp. 10-11) that secondary definitions in some dictionaries indicate that "proceeds" can sometimes mean "profits." But that does not undermine the government's fundamental point: The most common meaning of "proceeds" is "gross receipts," and this Court generally presumes that Congress has used a word in accordance with its primary meaning

unless there are contrary indications in the relevant statute. See Pet. 12-13 (citing *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998)). Here, nothing in the money laundering statute suggests that Congress intended a different meaning, and the statutory context confirms that "proceeds" means "gross receipts." As discussed above, a contrary interpretation would create serious enforcement problems. Moreover, Congress used "proceeds" to mean "gross receipts" in several related statutes, including in the Racketeer Influenced and Corrupt Organizations (RICO) forfeiture statute, which Congress amended just two years before it enacted the money laundering statute. Pet. 13-14. The legislative history of that statute confirms that Congress used the word "proceeds" "in order to alleviate the unreasonable burden on the government of proving net profits." S. Rep. No. 225, *supra*, at 199. There is no reason to believe that Congress took a different approach when it enacted the money laundering statute shortly thereafter and also used the term "proceeds."

Diaz points out (Br. in Opp. 11) that the Seventh Circuit has construed "proceeds" in the RICO forfeiture statute to mean "net profits," in harmony with its construction of the term in the money laundering statute. But that shows only that the Seventh Circuit has been consistent in its errors of statutory interpretation. Its interpretation of the RICO forfeiture statute is contrary both to the statute's clear legislative history and to the interpretation of the statute adopted by every other court of appeals. See Pet. 13 (citing cases).

Diaz also argues (Br. in Opp. 12) that "proceeds" cannot mean "gross receipts" or "gross revenue" in the money laundering statute because Congress has used those specific terms in certain other statutes. That ar-

gument is incorrect. First, it proves too much. The logic behind the argument dictates that "proceeds" also cannot mean "profits," as the Seventh Circuit has held, because Congress has used that term in some statutes. See 18 U.S.C. 2318(f)(2)(C)(ii)(I) and (3)(A)(ii) (Supp. IV 2004); 18 U.S.C. 2520(c)(2)(A). Second, this Court has expressly rejected the argument, recognizing that Congress sometimes uses different terms in different statutes even though it intends those terms to have a common meaning. See *Limtiaco* v. *Camacho*, No. 06-116 (Mar. 27, 2007), slip op. at 5-7 ("tax valuation" in 48 U.S.C. 1423a means "assessed valuation" even though Congress used "assessed valuation" in another statute).

Finally, in light of the clear support for the "gross receipts" definition of "proceeds," Diaz's reliance (Br. in Opp. 15) on the rule of lenity is misplaced. The rule of lenity applies only if there is such a "grievous ambiguity" in a statute that, "after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Muscarello*, 524 U.S. at 138-139 (internal quotation marks and ellipsis omitted). There is no ambiguity here.

* * * * *

For the foregoing reasons, and the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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